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NO. 82-1709

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

JEROME S. WAGSHAL,
Petitioner,

v.

CROZER-CHESTER MEDICAL CENTER,
UNIVERSITY OF SOUTHERN CALIFORNIA, and
COMMONWEALTH OF MASSACHUSETTS,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The District Of
Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certorari to review the Court of Appeals decision, which that Court noted did "not occasion the need for [a published] opinion", that the Eleventh Amendment prohibits a federal court from hearing a fee collection action brought by an attorney against a state.

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STATEMENT OF THE CASE

Statement of Interest.

This brief is submitted by the Attorney General of Massachusetts who represented the respondent Commonwealth

of Massachusetts below. The Attorney General respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the unpublished Judgment and accompanying Memorandum issued by the Court of Appeals for the District of Columbia Circuit on December 3, 1982. Appendix 1a-4a.

Statement of Facts and Prior Proceedings.

The respondent Commonwealth of Massachusetts does not quarrel with the substance of the facts as stated in petitioner's brief at pages 4-6. Those facts are that Mr. Wagshal, the petitioner, was retained by the Commonwealth and other parties to sue the federal government. He successfully did so and the Commonwealth and those other parties

benefited thereby. Id. However, it was determined that Mr. Wagshal could not be compensated for his efforts from the funds released by his lawsuit. National Association for Mental health, Inc. v. Califano, C.A. Nos. 75-2212, 75-2245, 561 F. 2d 1021 (D.C. Cir. 1977) rev'g 68 F.R.D. 387 (D.D.C. 1975). Subsequently, Mr. Wagshal moved in the original action and in a separate action for the District Court to order the original plaintiffs, including the Commonwealth, to pay him his fees "relying primarily on the equitable principle of quantum meruit." 6a. The District Court granted the Commonwealth's motion to dismiss on Eleventh Amendment grounds. 5a-8a. The Court of Appeals affirmed, 1a-3a, and denied Mr. Wagshal's petition for rehearing. 4a.

REASONS WHY THE WRIT SHOULD BE DENIED

As provided in Rule 17 of the Rules of this Court, "[a] review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor." The purpose of the Congressional grant of certiorari jurisdiction to this Court is to permit it to select cases "of such gravity and general importance" as to warrant review of the decision below. In Re Woods, 143 U.S. 202, 206 (1892); see also Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951) (". . . issuance of the writ is discretionary"); Wade v. Mayo, 334 U.S. 672, 680 (1948) ("[w]rits of certiorari are matters of grace."). This case does not raise any "special or important" issues that warrant certiorari review.

I. THE COURT OF APPEALS DECISION REFLECTS WELL-ESTABLISHED ELEVENTH AMENDMENT LAW.

A. The Eleventh Amendment Bars This Contract Claim.

The Court of Appeals holding in this case was that "[t]he Eleventh Amendment bars any action by Mr. Wagshal in federal court against the State of Massachusetts to recover payment for legal services which he rendered." 2a (emphasis in original). That holding is clearly correct. As the Court of Appeals recognized, Mr. Wagshal's claim is in essence a simple contract claim and the Eleventh Amendment denies federal courts jurisdiction of contract claims against a state. "For a breach of its contract by the State, it is conceded that there is no remedy by suit against the State

itself . . . . This immunity includes not only direct actions for damages for the breach of contract brought against the State by name, but all other actions or suits against it, whether at law or in equity." In Re Ayers, 123 U.S. 443, 502 (1887); see Litton Industries, Inc. v. Colon, 587 F. 2d 70, 73 (1st Cir. 1978) (Eleventh Amendment bars contract claim); see also Edelman v. Jordan, 415 U.S. 651, 665-67 (1974) (Eleventh Amendment also bars claims seeking "equitable restitution").

B. Hutto v. Finney Is Irrelevant To Any Issue In This Case.

In his brief (at 7) Mr. Wagshal claims that Hutto v. Finney, 437 U.S. 678 (1978), "permits fee awards [against a state] on all traditional equitable

grounds." But Hutto does not stand for any such broad principle. As the District Court correctly noted: "Hutto, however, is significantly distinguishable from the case at hand." 7a. Indeed, it is difficult to see any similarity at all between Hutto and this case except that they both involve attorneys' fees.

Hutto grew out of prolonged litigation involving the unconstitutional conditions of confinement in the Arkansas jails. In its decision this Court approved an award of attorneys' fees to the prevailing plaintiffs' attorneys from the defendants, who were officials of the Arkansas Department of Correction, payable out of the Department's funds. The fee award was based on two grounds, neither of which has any application

here. First, the Court noted that the District Court had found that defendants had litigated in bad faith which warranted an award of fees. Second, the Court noted that the substantive action had been brought under 42 U.S.C. §1983 and that 42 U.S.C. §1988 provides for the payment of attorneys' fees to prevailing plaintiffs in such actions by specifically defining such fees as compensable "costs."

One glaring difference between Hutto and this case is, of course, the fact that Mr. Wagshal never represented an adversary of the Commonwealth, but was instead hired by the Commonwealth to represent it. The Commonwealth thus is in the position of the prevailing plaintiffs in Hutto rather than in the role

of the losing defendants who had to pay the plaintiffs' attorneys' fees. Second, there has never been any finding that the Commonwealth litigated in "bad faith."[1/] Third, neither the original class action nor this separate action involved section 1983 and so section 1988 is plainly inapplicable. Finally, Hutto was brought as part of the original litigation while this case involves a new action entirely separate from the action in which the fees were incurred. For all of these reasons Hutto has no resemblance to this case at all.

Furthermore, this Court has made it quite clear that Hutto was not designed to open a wedge in the Eleventh

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1/ Indeed, since Mr. Wagshal was the Commonwealth's attorney, if there had been any such bad faith, it would have been attributed to him.

Amendment shield. Only a few days after Hutto the Court decided Alabama v. Pugh, 438 U.S. 781, 782 (1978) in which it reaffirmed that normally any suit against a state ". . . is barred by the Eleventh Amendment, unless [the state] has consented to the filing of such a suit."

To make the matter even clearer, the Court amplified its intent the next year in Quern v. Jordan, 440 U.S. 332, 338-45 (1979). In Quern the Court emphasized the continuing vitality of the Eleventh Amendment analysis contained in Edelman. Id. at 338-39. Thus even after Hutto it remains clear that that Amendment shields a state from federal judicial award of monetary relief except when: (1) the State has clearly waived such protection, or (2) Congress clearly has decided to

use its power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity in a specific category of case or activity. Quern, supra; Pugh, supra; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Except in those circumstances, neither of which applies here, ". . . it is undisputed that the [Eleventh] Amendment operates to bar award of a monetary judgment directly against the state . . .". Spicer v. Hilton, 618 F. 2d 232, 236 (3rd Cir. 1980). "If the State is named directly in the complaint and has not consented to the suit, it must be dismissed from the action." Florida Department of State v. Treasure Salvors, Inc., ___ U.S. ___, 102 S. Ct. 3304, 3314 (1982).

C. The Commonwealth Has Not Waived Its Eleventh Amendment Immunity.

Mr. Wagshal also contends that the Commonwealth has waived its Eleventh Amendment immunity from suit in the federal court. While it is true that immunity can be waived by a state,[2/] the Commonwealth has plainly not done so here.

The sole piece of evidence that Mr. Wagshal points to to support his claim of waiver is the telegram authorizing him to represent the Commonwealth. 9a-10a. That telegram might be sufficient to create a contract between Mr. Wagshal and the Commonwealth, but by no stretch of the imagination does it either explicitly or implicitly confer a right to

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2/ See Alabama v. Pugh, 438 U.S. 781, 782 (1978).

sue on that contract in federal court. A waiver of Eleventh Amendment immunity must be shown either "by the most express language" or by "such overwhelming implications . . . as will leave no room for any other reasonable construction." Edelman v. Jordan, 415 U.S. 651, 673 (1974) (citations omitted); see also Florida Department of Health and Rehabilitation Services v. Florida Nursing Home Association, 450 U.S. 147, 150 (1981). No such showing has or could be made here.

Mr. Wagshal appears to confuse the status of the Commonwealth as a party and its status as a client. As a party, the Commonwealth's general appearance in the litigation left it open to possible

counterclaims from the opposing party.[3] But Mr. Wagshal was not the opposing party, he was the Commonwealth's attorney. The Commonwealth's retainer of his services in prosecuting the original action no more authorized him to sue for breach of that agreement than would the deposit of the Commonwealth's brief in a Federal Express delivery bin authorize that company to sue the Commonwealth in federal court for nonpayment of its fee. A state's contract with an attorney is not intrinsically different from its contract with anyone else and if the Eleventh Amendment bars federal suits to enforce state contracts --

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3/ We note, however, that, contrary to Mr. Wagshal's suggestion, a state's general appearance in a case does not necessarily mean its Eleventh Amendment protection is automatically and totally void.

which it does -- then it bars collection suits by attorneys just as it bars such suits by plumbers. Mr. Wagshal's status as an attorney gives him no special rights at all. The Commonwealth never waived its Eleventh Amendment immunity from suit in federal court and so Mr. Wagshal's effort to bring such a suit was properly dismissed.[4/]

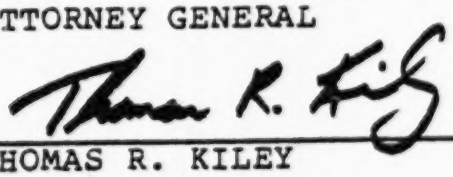
4/ The Eleventh Amendment is a complete bar to Mr. Wagshal's claim against the Commonwealth in federal court. However, as the Court of Appeals recognized, Mr. Wagshal is not totally without a forum to hear his claim of breach of contract. 2a-3a. Although it is under no legal obligation to do so, the Commonwealth has consented to being sued in contract in its courts. Mass. G.L. c. 258, §§1, 3. It is those courts which are the sole and proper forum for determining whether Mr. Wagshal is entitled to compensation from the Commonwealth. Of course, the state's consent to suit in its own courts is not itself a waiver of its immunity to suit in federal court. See Irwin v. Commissioner of the Department of Youth Services, 388 Mass. 810, 811, ___ N.E. 2d ___ (April 15, 1983).

CONCLUSION

The petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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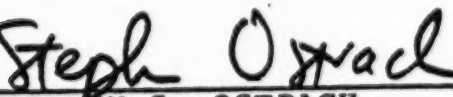

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